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No. 84-6807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MILLIE R. LEE,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

On Writ Of Certiorari
To The Appellate Court Of Illinois
Fifth Judicial District

REPLY BRIEF FOR PETITIONER

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ARGUMENT

THE PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HER WAS VIOLATED BY THE TRIAL COURT'S CONSIDERATION OF THE NONTESTIFYING CO-DEFENDANT'S CONFESSION AS SUBSTANTIVE EVIDENCE IN DETERMINING PETITIONER'S GUILT.

A. The Respondent's Position Before This Honorable Court Is A Major Departure From Well Settled Principles.

The petitioner Millie R. Lee has consistently maintained that her sixth and fourteenth amendment right to confront the witnesses against her was violated, that the trial court improperly considered co-defendant Edwin Thomas' confession as substantive evidence to reject her defense put forth at trial. The respondent State of Illinois' position has not been as consistent. In its brief on the merits before This Honorable Court, the State of Illinois contends for the first time that the co-defendant's confession was proper for use against the petitioner as substantive evidence. This position was not put forth by the State at trial and is at variance with its position in its response to the petition for a writ of certiorari. In its response to the petition before This Honorable Court the State of Illinois stated "a co-defendant's confession may be used only against the declarant" and the trial "court should not in any way have considered the co-defendant's confession against petitioner." (Respondent's brief in opposition at 4) Now the State of Illinois contends that the co-defendant's confession was so reliable and the utility of cross-examination of the co-defendant by petitioner so remote that the co-defendant's confession could be used as substantive evidence. This position is a major departure from well settled law since the adoption of the Constitution of the United States and should be rejected by This Court.

The proposition that a co-defendant's hearsay out-of-court statement made while in police custody may be used as substantive evidence against the defendant has been rejected in numerous cases before This Honorable Court. *Krulewitch* v. *United States*, 336 U.S. 440 (1949); *Fiswick* v. *United States*, 329 U.S. 211 (1946); *Logan* v. *United States*, 144 U.S. 263 (1892). Illinois courts have followed the same general rule. *People* v. *Tate*, 30 Ill. 2d 400, 197 N.E.2d 26 (1964); *People* v. *Clark*, 17 Ill. 2d 486, 162 N.E.2d 413 (1959); *People* v. *Tunstall*, 17 Ill. 2d 160, 161 N.E.2d 300 (1959); *People* v. *Buckminister*, 274 Ill. 435, 113 N.E.2d 713 (1916); *People* v. *Eddington*, 129 Ill. App. 3d 745, 473 N.E.2d 103 (4th Dist. 1984). Illinois Pattern Jury Instructions-Criminal 2d No. 3.08 instructs the jury that: "A statement made by one defendant may not be considered by you against any other defendant." See also 1 S. Gard, Illinois Evidence Manual, § 1107 at 455 (2d ed. 1979). Historically the courts have been concerned with co-defendant confessions because of the hearsay problem and the underlying concern of the general unreliability of hearsay. Justice White expressed those concerns in his dissent in *Bruton* v. *United States*, 391 U.S. 123, 141 (1968) when he stated:

> As to the defendant, the confession of the co-defendant is wholly inadmissible. It is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . [T]he statements of a co-defendant have traditionally been viewed with special suspicion. [citations omitted] Due to his strong motivation to implicate the defendant and to exonerate himself, a co-defendant's statements about what the defendant said or did are less than credible than ordinary hearsay evidence.

This Honorable Court in *Donnelly* v. *United States*, 228 U.S. 243, 273 (1913) stated:

> Hearsay evidence, with a few well recognized exceptions, is excluded by courts that adhere to the principles of the common law. The chief grounds of its exclusion are, that the reported declaration (if in fact made) is made without the sanction of an oath, with no responsibility on the part of the declarant for error or falsification, without opportunity for the court, jury, or parties to observe the demeanor and temperament of the witness, and to search his motives and test his accuracy and veracity by cross-examination, these being most important safe-guards of the truth, where a witness testifies in person, and as of his own knowledge; and, moreover, he who swears in court to the extra-judicial declaration does so (especially where the alleged declarant is dead) free from the embarassment of present contradiction and with little or no danger of successful prosecution for perjury. It is commonly recognized that this double relaxation of the ordinary safeguards must very greatly multiply the probabilities of error, and that hearsay evidence is an unsafe reliance in a court of justice.

While the Court has never equated the confrontation clause with the hearsay rule, they have similar concerns and roots. *Dutton* v. *Evans*, 400 U.S. 74, 86 (1970). In *Douglas* v. *Alabama*, 380 U.S. 415, 419 (1965) This Court held that "[i]n the circumstances of this case, [Douglas'] inability to cross-examine [the co-defendant] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." In *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966) This Honorable Court noted that a concession of constitutional error involving the right of confrontation was properly made by the State of Ohio involving the introduction into evidence against Brookhart of the out-of-court confession of the co-defendant who did not testify at trial. It is against this back-drop of cases that the respondent made its initial

concession of error in its response to the petition for a writ of certiorari and against which This Honorable Court must now judge respondent's pleas to alter the settled law. This Court in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), noted that it rejected "the invitation to overrule a near-century of jurisprudence" concerning the confrontation clause of the sixth amendment. 488 U.S. at 67 n.9. Your Honors should similarly reject the respondent's invitation in this case.

B. Co-Defendant Thomas Was Never Shown To Be Unavailable To Testify.

The respondent attempts to justify the use of co-defendant Thomas' confession against the petitioner in this case on the basis that Thomas was not available to testify at trial. (See Brief for Respondent at 13-15) This also is a position not taken or demonstrated by the State of Illinois in the trial court. The respondent's argument is based solely on the speculation of the respondent that if called to testify Thomas would have claimed his fifth amendment right against self-incrimination. At no time at trial did the State of Illinois ever attempt to call the co-defendant as a witness against the petitioner. This Honorable Court in *Ohio* v. *Roberts*, discussed the requirement of unavailability and stated: "We accept as a general rule, of course, the proposition that 'the possibility of refusal is not the equivalent of asking and receiving a rebuff.'" 448 U.S. at 76, quoting *Barber* v. *Page*, 390 U.S. 719, 724 (1968). The respondent has not shown that Thomas rebuffed any attempt by the State of Illinois to procure his testimony against the petitioner.

The Court in *Roberts* also stated "if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may

demand their effectuation." 448 U.S. at 74. If the State of Illinois wished to have Thomas' version as evidence against the petitioner there were other options available to the prosecution to obtain his testimony against the petitioner. The prosecution could have engaged in a plea bargain with Thomas so that he would be willing to testify at any trial of the petitioner. The prosecution could have convicted Thomas of the offenses in a separate trial and then presented him as a witness at petitioner's trial where he could not claim any right against self-incrimination. The prosecution could have tried petitioner separately from Thomas and granted Thomas immunity from the use of his testimony against himself. *See Parker* v. *Randolph*, 442 U.S. 62, 87 (1979) (Stevens, J. dissenting). Without any attempt by the prosecution to obtain Thomas' testimony at trial, the respondent cannot now claim before This Court that Thomas was unavailable as a witness.

C. The Petitioner Was Not Able To Test The Veracity of The Co-Defendant's Confession And The State Has Not Demonstrated That The Co-Defendant's Confession Was Reliable On The Points Utilized By The Trial Court To Reject Petitioner's Defense.

The problem with the respondent's contention that the co-defendant's confession is completely reliable is that it is based solely on the areas in which the petitioner's statement and the co-defendant's confession agree as to what occurred and the physical evidence that corroborated how the bodies were later disposed. However, as pointed out in petitioner's brief, major differences exist between petitioner's statement and the co-defendant's confession. On these points of difference the co-defendant's confession is not corroborated by any other evidence.

A major fault with the respondent's reasoning is that it is based on a faulty syllogism. The basic syllogism the respondent relies on is:

1. Coerced and involuntary confessions and statements against penal interest are unreliable.

2. The trial court found that the co-defendant was not coerced and gave a voluntary confession.

Therefore the co-defendant's confession is reliable.

Unfortunately for the respondent's position, the major premise is not necessarily true and the conclusion does not follow from the premises. The purpose of suppression hearings is totally removed from questions of truth and falsity. This Honorable Court in *Jackson* v. *Denno*, 378 U.S. 368 (1964) held that the issue of voluntariness must first be decided by the trial judge before a confession can be admitted before a jury. The Court stated that a determination of the voluntariness of a confession was to be "a determination uninfluenced by the truth or falsity of the confession." 378 U.S. at 376-77. Your Honors recognized that the unreliability or reliability of a confession may have no relationship to whether the confession was coerced or uncoerced. Some coerced and involuntary confessions are reliable and true. Many uncoerced and voluntary confessions are unreliable and not true. *See Rogers* v. *Richmond*, 365 U.S. 534 (1961).

This Honorable Court has recognized the inherent problems in this area and has pointed out the dangers of the general unreliability of confessions by co-defendants and by accomplice testimony at trial. In *Bruton* v. *United States*, 391 U.S. 123, 136 (1968), the Court stated that the credibility of a co-defendant's confession "is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others." The same motivation to shift or share blame

is present in this case contrary to respondent's efforts to deny such a motivation. Respondent asserts in its brief:

> [Thomas] made no attempt to shift blame to Petitioner. To the contrary, he freely described his own actions in stabbing Odessa Harris and in beating Mattie Darden. He attributes to himself conduct ascribed to him by Petitioner's confession, and *attributes to Petitioner actions which she admits taking*. (Brief for Respondent at 16) (emphasis added)

This is the very heart of the problem because the co-defendant also attributes to petitioner actions which she does not admit taking. It is those actions attributed to petitioner by the co-defendant which have no demonstrable reliablity.

Motivation to shift blame does not merely encompass placing all blame on the defendant by the guilty co-defendant and thereby absolving himself of any blame, as respondent seems to suggest; it also encompasses various gradations. An individual being questioned by the police may try to shift all, most or some of the blame to another. A co-defendant may also detail actions in an out-of-court statement which places blame on himself, but untruthfully represent the defendant's degree of culpability. Various psychological factors contribute to this shifting and sharing of blame, including not wanting to be perceived as the only actor, to demonstrate that another believed the action taken was necessary, to curry favor, or to drag another down with him.

In this case Thomas was arrested and questioned only because the petitioner had given the police a statement implicating him. Thomas' responsibility may very well have never been uncovered but for the petitioner. Thomas therefore had reason to bear malice toward the petitioner. Thomas may very well have embellished petitioner's role

in the killings to ensure that petitioner, who caused his problem, went with him. Thomas testified on his motion to suppress his confession that he gave his confession only after he had been informed that petitioner gave a statement implicating him in the two deaths, and was told that he would "burn" unless he talked. (R.222-24) This sequence of events not only demonstrates the possibility of malice towards petitioner, but the possibility of an attempt to "curry police favor."

While respondent contends that there is no possibility Thomas was trying to curry favor (Brief for Respondent at 16-17), such possiblity does exist. While Thomas' account may be "chilling," it may also be exactly what Thomas believed the police required him to relate so that he would not "burn." Thomas' testimony that he was threatened with the death penalty unless he confessed supports the possibility that Thomas was currying favor to avoid the possibility of the death penalty. Also, while it is not clear from the record to what extent Thomas was informed of petitioner's statement, he may have been embellishing petitioner's participation to curry favor with the police, since the police were not totally satisfied with petitioner's statement in the area of intent to kill. Thomas' confession certainly heaps more blame upon the petitioner in that critical area. Thomas' confession is touched with all these factors and many that are hidden. What is known is that Thomas' confession differs considerably from petitioner's statement.

Only Thomas' confession details that there was a prior plan and discussions between Thomas and petitioner to kill Mattie Darden. Only Thomas' confession details that petitioner and he also discussed having to kill Odessa Harris in connection with the plan to kill Mattie Darden. Only Thomas' confession details that petitioner

intentionally lured Harris back to the kitchen in order to facilitate Thomas' attack on Harris. These assertions by Thomas are not in petitioner's statement. These assertions by Thomas are not corroborated by any evidence. These assertions are not shown to be reliable beyond Thomas' merely making the statements to the police. However, these are the points upon which the trial court relied in rejecting petitioner's defense and finding her guilty of murder.

Other differences exist between petitioner's statement and Thomas' confession beyond what Thomas told the police and what petitioner did not. The details of the stabbing of Odessa Harris vary in significant detail between Thomas' version and petitioner's. Petitioner's statement details that her conversation with Harris was finished and Harris was walking back to Darden's bedroom when Thomas stabbed Harris in the back while Harris was in the hall. (J.A.6-7, 13) However, Thomas' confession details that he approached Harris while she was in the kitchen talking to petitioner and that he attempted to stab Harris in the back, but was caught by Harris and he had to wrestle Harris to the floor. Thomas stabbed Harris while she was lying on the floor on her back. (J.A.18-19) There is no independent corroboration to demonstrate that Thomas' version is correct on this point.

Thomas' confession also details that after he stabbed Harris he told petitioner she had to keep Darden quiet and handed petitioner a knife. (J.A.19) However, petitioner merely indicated that she ran or walked into Darden's bedroom, was confronted by Darden with a knife, and ran back to the kitchen to obtain a knife. (J.47) If petitioner already had a knife, as Thomas stated, there would be no need for petitioner to run out of Darden's

bedroom to obtain a knife as petitioner stated. However, respondent uses both of these different statements in its brief in an attempt to demonstrate petitioner's guilt of two murders. (Brief for respondent at 18-19) The respondent uses Thomas' version to bolster the contention that petitioner was accountable for Thomas' actions by aiding Thomas in the murder of Harris by preventing Darden from interfering in the murder of Harris since she took a knife into the room originally. Thomas' version also demonstrates prior knowledge and agreement in his actions by petitioner. However, respondent also uses petitioner's version in an attempt to demonstrate that petitioner's actions in killing Darden was not voluntary manslaughter by arguing that once petitioner left the bedroom to obtain the knife there was no need for her to return, and thus no reasonable basis for believing her actions against Darden were justified.

Respondent asserts that cross-examination of Thomas by petitioner would have been of little value to petitioner to demonstrate Thomas' statement was unreliable. (Brief for Respondent at 14, 28) However, the respondent assumes that if Thomas had been called as a witness he would have affirmed his confession as being true. Thomas pled not guilty to these offenses and moved to suppress his confessions, factors that detract from the respondent's claim of reliability. Whether Thomas would have affirmed all or part of his confession, or repudiated all or part of his confession is not known. What is known is that Thomas did not testify and petitioner was unable to cross-examine Thomas to test the reliability of his out-of-court confession. Cross-examination of Thomas may well have caused Thomas to repudiate those parts of his confession which detailed an intent to kill on petitioner's part, or have demonstrated those assertions to be unreliable. The

very purpose of cross-examination is to test reliability before the trier of fact. In this case the trier of fact never observed Thomas make his devastating allegations against the petitioner and was never able to determine their reliability.

Petitioner reasserts, as in her original brief, that her statement to the police was not a confession to two murders. Admittedly it is a statement against her penal interest in that it is a confession to the offense of concealment of a homicidal death. (Ill. Rev. Stat., 1985, Ch. 38, § 9-3.1) Admittedly, it is a statement that might permit the finder of fact at trial to find her guilty of voluntary manslaughter or murder based upon inferences from the proper evidence. However, it was not a confession to murder, since she never confessed to the requisite element of intent, she never admitted that she intended to kill either Harris or Darden. She never admitted she planned with Thomas to kill or aid him in killing. Consequently this is not an "interlocking confessions case," as petitioner has put forth before, and Thomas' confession has not been demonstrated to be reliable to impute to her such an intent.

D. Petitioner Did Not Waive The Opportunity To Test The Truth Or Falsity of The Co-Defendant's Confession And The Parts Detailing Her Intent To Kill.

The State of Illinois contends for the first time that petitioner had an adequate opportunity to cross-examine the co-defendant, since the co-defendant testified in connection with his motion to suppress his confession as involuntary and the petitioner did not cross-examine him. This is a position not put forth by the State of Illinois in petitioner's appeal in the Appellate Court of Illinois, Fifth Judicial District.

The respondent cites the case of *United States ex rel. Duff* v. *Zelker*, 452 F.2d 1009, 1010 (2d Cir. 1971), *cert.*

denied, 405 U.S. 432 (1972) for its position. *Zelker* is extremely unpersuasive authority for this proposition and provides no analysis for the assertion. In *Zelker* the Court had already determined that no reversible error occurred under *Bruton* since the two co-defendants of Zelker had made interlocking confessions. As an aside the Court stated in one short paragraph that one co-defendant had been cross-examined by Zelker at a pretrial motion to suppress and therefore no denial of confrontation was involved concerning that co-defendant's confession. Petitioner contends that she in fact had no opportunity to confront the co-defendant concerning the truth or falsity of his confession and the parts which implicated her more seriously.

The respondent fails to consider the only purpose for which co-defendant Thomas testified was in support of his motion to suppress his confession as being involuntary, not as part of his case-in-chief at trial. (R.205, 219) *See* Ill. Rev. Stat., 1985, Ch. 38, § 114-11. This Honorable Court in *Jackson* v. *Denno*, 378 U.S. 368, 376-77 (1964) held that a defendant has a constitutional right to object to the use of an allegedly involuntary confession "and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." The Illinois Supreme Court has stated similarly that "[i]n determining admissibility of a confession the ultimate test is the test of voluntariness made without reference to the probable truth or falsity thereof." *People* v. *Hudson*, 38 Ill. 2d 616, 233 N.E.2d 403, 405 (1968). In this case, the hearing to determine the admissibility of Thomas' confession was held during the bench trial, instead of in a pre-trial hearing, a procedure authorized under Illinois law. *See People* v. *Fultz*, 32 Ill. App. 3d 317, 336 N.E.2d 288 (1st Dist. 1975). Since

Thomas was testifying only in support of his motion to suppress the confession the truth or falsity of the confession was not at issue, and the petitioner was not able to cross-examine Thomas as to the truth or falsity of those parts of his confession which were damaging to the petitioner. While petitioner may have been free to question Thomas concerning facts within his knowledge as to the voluntary nature of petitioner's statement, petitioner was not given free rein to stray beyond the bounds of the intended purpose of his testifying. The State of Illinois' cross-examination of both petitioner and Thomas during their testimony demonstrates that it understood the purpose of the testimony was only as to voluntariness and did not allow the prosecutor to cross-examine concerning the truth or falsity of either Thomas' confession or petitioner's statement. *Compare United States* v. *Wingate*, 520 F.2d 309, 315-16 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976) (defendant may not introduce co-defendant's suppression hearing testimony at trial, since prosecution unable to cross-examine co-defendant as to defendant's guilt). Consequently, petitioner's failure to examine Thomas was not, as respondent asserts, "that petitioner could not hope to persuade the trier of fact that Thomas' confession was unreliable where it so closely matched her own" (Brief for Respondent at 28), but that petitioner had no such opportunity.

CONCLUSION

In *Dutton* v. *Evans*, 400 U.S. 74, 87 (1970) the plurality opinion examined the cases decided by this Court under the confrontation clause and determined that the concerns expressed in those cases were not present in that case. The plurality in *Evans* stated: "This case does not involve evidence in any sense 'crucial' or 'devastating' . . . ." The case before this Court does; the co-defendant's

hearsay confession was both crucial and devastating since the trial court rejected petitioner's defense based on the co-defendant's confession. The plurality in *Evans* stated: "It does not involve the use, or misuse, of a confession made in the coercive atmosphere of official interrogation. . . ." The case before this Court does, since the trier of fact used and misused the co-defendant's custodial confession. The plurality in *Evans* stated: "It does not involve any suggestion of prosecutorial misconduct or even negligence. . . ." The case before this Court does, since the prosecution never attempted to obtain the co-defendant's testimony at trial. The plurality in *Evans* stated: "It does not involve the use by the prosecution of a paper transcript. . . ." The case before this Court does, since the co-defendant's confession was committed to paper and relied upon by the trial court in the determination of petitioner's guilt. The plurality in *Evans* stated: "It does not involve a joint trial. . . ." The case before this Court does. The plurality in *Evans* stated: "And it certainly does not involve the wholesale denial of cross-examination. . . ." The case before this Court does, since the petitioner was unable to cross-examine the co-defendant at trial concerning the devastating allegations in his confession as to petitioner's intent to kill. Petitioner's defense at trial was that she did not have the requisite intent and the trial court imputed such an intent to her on the basis of the co-defendant's confession. The co-defendant never testified at trial except in connection with his motion to suppress his confession and the petitioner was not able to confront the co-defendant concerning the veracity of the confession. Consequently, the petitioner's sixth and fourteenth amendment right to confront the witnesses against her was violated. The petitioner respectfully requests that This Honorable Court reverse the judgments of the Appellate Court of Illinois, Fifth Judicial

District, and the Circuit Court of St. Clair County, and grant her a new trial free from such constitutional error.

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